

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER SCOTT WHITBURN,

Defendant-Appellant.

UNPUBLISHED

December 20, 2011

No. 300195

Ogemaw Circuit Court

LC No. 10-003396-FH

Before: CAVANAGH, P.J., and SAWYER and METER, JJ.

PER CURIAM.

Defendant appeals as of right from his jury conviction of first-degree home invasion, MCL 750.110a(2), for which he was sentenced to 20 months to 20 years in jail. We affirm.

Defendant argues that the trial court abused its discretion by denying his motion for a new trial. Defendant had argued that he was denied the effective assistance of counsel at trial because counsel failed to request a self-defense instruction.

We review a trial court's decision to grant or deny a new trial for an abuse of discretion. *People v Terrell*, 289 Mich App 553, 558; 797 NW2d 684 (2010). The trial court does not abuse its discretion when its decision is within the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003); *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. *People v Taylor*, 275 Mich App 177, 186; 737 NW2d 790 (2007). The defendant must also show that the resultant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Counsel's performance was deficient if it fell below an objective standard of professional reasonableness. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). The performance prejudiced the defense if it is reasonably probable that, but for counsel's error, the result of the proceedings would have been different. *Id.*

Jury instructions must be read as a whole to determine whether error occurred. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). "The instructions must include all elements of the crime charged and must not exclude consideration of material issues, defenses,

and theories for which there is supporting evidence.” *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). A new trial may be warranted if the jury instructions exclude consideration of a defendant’s viable defense. *Id.*

Defendant was convicted of first-degree home invasion, which, in the context of this case, required proof that he broke into and entered a dwelling and that, while he entered, was present in, or left the dwelling, he committed an assault and another person was lawfully present in the dwelling. MCL 750.110a(2). Self-defense is an affirmative defense that justifies otherwise punishable criminal conduct. *People v Dupree*, 486 Mich 693, 707; 788 NW2d 399 (2010). “[O]ne who is not the aggressor in an encounter is justified in using a reasonable amount of force against his adversary when he reasonably believes (a) that he is in immediate danger of unlawful bodily harm from his adversary and (b) that the use of such force is necessary to avoid this danger.” *Id.*, quoting 2 LaFave, Substantive Criminal Law (2d ed), § 10.4, p 142.

Here, defendant testified that he knocked on Andy Howell’s door to confront Howell regarding a conflict that Howell may have had with defendant’s wife and daughter. Defendant’s wife was the driver of the car that defendant used to reach Howell’s home. Defendant stated that Howell opened the door and sprayed him with bug spray, blinding him. Defendant said that he entered the home to try to wrestle the can of bug spray away from Howell. Defendant’s wife testified that, from the car, she saw defendant get hit with a stream of something, put his arm over his face, and enter the home. Defendant asserted in his opening statement that he acted in self-defense to enter the home and seize the can from Howell.

The evidence did not support the giving of a self-defense instruction. The evidence showed that defendant was the aggressor. Defendant acknowledged that he did not have permission to enter the home and that he touched Howell in an unwanted way. Howell testified that he sprayed defendant with the bug spray only after defendant kicked through the closed door, breaking the doorjamb. Howell stated that he broke the top off the can of bug spray and threw it under the couch when defendant tried to wrestle it from him and was threatening to spray Howell with it. Howell covered himself on the ground while defendant punched and kicked him. Significantly, the investigating officer described extensive damage to the door and doorjamb. It was obvious to the investigator that the door was broken open with force. In addition, no evidence showed that defendant remained in immediate danger if he stayed on the porch; the use of force was not necessary to avoid the danger. *Dupree*, 486 Mich at 707. Defendant could have retreated beyond the range of the spray. It was not reasonable to enter the home and use force against Howell. Moreover, defendant was not avoiding the danger of the spray by using force against Howell after he had disabled the can of spray. Under the circumstances, defendant could not claim self-defense. *Id.* at 707-708.

The trial court found that a self-defense instruction would not have been appropriate because the evidence did not support it, defendant was the aggressor, and defendant was not in danger on the porch. The trial court provided sound reasoning in concluding that it would not have issued a self-defense instruction even if one had been requested. Counsel cannot be considered to have rendered ineffective assistance by failing to request such an instruction. The trial court did not abuse its discretion by denying defendant’s motion for a new trial.

Defendant also argues that the trial court erred in giving an instruction to the jury that defendant's wife, Tracy Whitburn, could have been an accomplice to the crime and the jury should consider her testimony with caution. We disagree.

We review a trial court's decision to give an accomplice instruction for an abuse of discretion. *People v Young*, 472 Mich 130, 135; 693 NW2d 801 (2005).

Defendant argues that the accomplice instruction was not appropriate because Tracy was not an accomplice. However, Tracy testified that she drove defendant and two friends to and from the scene of the crime, was present at the scene, and did not report the incident to the police. The trial court did not identify Tracy as an accomplice; rather, it gave the jury the definition of an accomplice and instructed the jury to determine whether she was an accomplice. The evidence supported the trial court's decision to give the instruction. See *Kurr*, 253 Mich App at 327 (discussing jury instructions in general).

Defendant argues that the accomplice instruction made little sense under the circumstances because an accomplice called by a defendant would not want to provide facts detrimental to the prosecution's case out of fear that she would be prosecuted by a displeased prosecutor. However, in cases where the witness is called by the defendant, the witness may be inclined to give exculpatory testimony for reasons such as avoiding liability for the underlying crime or bolstering an associate's testimony. In *People v Heikkinen*, 250 Mich App 322, 328, 333-337; 646 NW2d 190 (2002), this Court found that it was permissible for a trial court to issue a cautionary instruction regarding an accomplice's testimony even when the testimony is favorable to the defendant. Here, the cautionary instruction was appropriate because the case involved a credibility determination between Howell and defendant, a third eyewitness friend of defendant could not be located, and Howell's conflict with Tracy was the subject of the confrontation. See *id.* at 337-338 (indicating that the individual circumstances of the case should be analyzed when considering an accomplice instruction).

Defendant also asserts that the cautionary accomplice instruction was a simple effort to influence the jury to reject Tracy's testimony. However, the trial court's instruction did not interfere with the jury's responsibility to determine Tracy's credibility. Instead, the cautionary instruction reinforced the jury's role in determining her credibility and advised close scrutiny of her testimony, if the jury found her to be an accomplice. The trial court did not abuse its discretion by issuing a cautionary instruction regarding Tracy's testimony.

Affirmed.

/s/ Mark J. Cavanagh
/s/ David H. Sawyer
/s/ Patrick M. Meter